Supreme Court, U.S.
FILED

931913 MAY 27 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1993

GEORGE SANTOSUOSSO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. May an appellate court, consistent with the holding of United States v. Dunnigan, ___ U.S. ___, 113 S. Ct. 1111 (1993), conclude that a defendant's sentence was increased under U.S.S.G. § 3C1.1 for obstruction and thereby uphold a sentence, when the district court failed to make specific findings as to all of the elements of perjury, and when the record contains no evidence that § 3C1.1 was actually applied by the district court?

II. May an appellate court make de novo findings of fact on a motion to suppress oral statements, or is the court required to remand the case when the district court fails to address the substantive merits of a suppression motion?

III. Do Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410 bar the introduction of statements made during the course of pre-indictment plea bargain discussions, even assuming arguendo that a plea bar-

gain has been reached, if the potential defendant elects to cease cooperating with the government and thus, does not enter in a plea of guilty?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, George Santosuosso, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on February 28, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is set forth in the Appendix at A1-A-36. The transcript of the sentencing proceedings before the district court is set forth at A-37 - A-45 The unreported memorandum opinion and order of the district court denying the petitioner's motion to suppress oral statements is set forth at A-46 - A-57. The judgment entered by the district court appears at A-58 - A-63. The order of the court of appeals denying petitioner's petition for rehearing is set forth at A-64.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Sixth Circuit was entered on February 28, 1994. The Court of Appeals' order denying petitioner's timely-filed petition for rehearing was entered on April 28, 1994. This Court has jurisdiction to review the judgment of a United States Court of Appeals in a criminal case by writ of certiorari, pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The relevant statutory provisions, Federal Rules of Criminal Procedure, Federal Rules of Evidence and United States Sentencing Guidelines are reprinted at A-65 - A-82.

STATEMENT OF THE CASE

Petitioner seeks review of the decision below, which upheld the sentence of 21 months imprisonment imposed by the district court and more specifically, the validity of an enhancement for obstruction pursuant to U.S.S.G. § 3C1.1, where the district court announced it would not impose an enhancement for obstruction and failed to make specific findings of perjury. This case also presents the Court with the opportunity to discuss the degree of de novo fact finding an appellate court is permitted to make in reviewing motions on which the lower court did not rule, as well as to examine the policies underlying the Rules of Evidence and Criminal Procedure prohibiting the admissibility of statements made during plea discussions that do not result in a guilty plea.

This case had its genesis in late January 1988, when petitioner was served with a subpoena com-

manding him to appear before the grand jury on February 2, 1988. Accompanied by his family lawyer, who had little, if any experience in federal or state criminal matters, petitioner appeared before the grand jury and was immediately told he was a subject of the grand jury's investigation. TT 322.[1] Notwithstanding that fact, petitioner testified and responded to questions concerning, inter alia, whether his brother was a bookmaker, of which he denied knowledge, and whether he placed bets of more than $50.00 and bet on more than one game at a time with Emmet "Lucky" Taylor, the target of the investigation. He was also asked whether he acted as a go-between for Taylor, which he denied. After answering those questions and

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[1] References to the transcript of the trial are identified as "TT" followed by the page number. References to the transcript of the suppression hearing are identified "ST" followed by the page number, while references to the transcript of sentencing are identified "SENT."

several others, the petitioner was warned by the Assistant United States Attorney ("AUSA") of perjury and its potential penalties. Petitioner insisted he was telling the truth. He answered more questions and was then excused, his entire appearance before the grand jury lasting not more than thirty minutes.

Several days later, petitioner's counsel was contacted by the AUSA, who advised him he believed petitioner had committed perjury before the grand jury. A meeting between the AUSA and petitioner and his counsel was scheduled for February 4, 1988.

At that meeting, petitioner provided essentially the same information as he had during his grand jury appearance. But the AUSA was not satisfied with petitioner's statement. So, near the end of the meeting when petitioner was alone and out of the presence of his counsel, the AUSA decided to test petitioner's veracity by telling him--falsely--that the government

was in possession of tape recordings that contradicted his testimony. Then, in an effort to entice the petitioner to make further statements, he asked petitioner if he would supply the government with a voice exemplar. ST. 67.

A second meeting between petitioner and the government was scheduled for February 11, 1988, to discuss petitioner's further cooperation and to possibly reduce his alleged potential criminal liability to a single count of perjury. The statements made by petitioner at that meeting were essential to the government's case-in-chief, for, at that meeting, petitioner contradicted his grand jury testimony. He told the government that he knew his brother was a bookmaker and that he bet up to 20 games per weekend with Lucky Taylor. TT. 374, 375, 379.

A third meeting between the AUSA and petitioner and his counsel was scheduled for February 25, 1988.

When petitioner was questioned about his gambling with persons other than Taylor, he declined to answer. The government then terminated the meeting. At no time during these interviews was a written plea agreement executed by petitioner and the government, nor was any proffer agreement signed.

On October 9, 1990, the five count indictment against the petitioner was returned. In the course of pretrial proceedings, petitioner moved to suppress his February 11, 1988 statements on two separate and distinct grounds. First, he claimed that the statements were inadmissible under Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410 because they were made in the course of plea discussions that did not result in a guilty plea; and second, because the statements were coerced as a result of governmental misconduct, namely the AUSA advising petitioner it had incriminating tape recordings of him. After an evi-

dentiary hearing, the district court denied the motion as to petitioner's assertion that the statement was coerced. See Memorandum of Opinion at 5; A-55. The district court never ruled on the issue of admissibility of the statements under Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6). Ibid.

At trial, the district court entered a judgment of acquittal as to the gambling charge after the government's case-in-chief, pursuant to Fed. R. Crim. P. 29. Petitioner was acquitted of perjury as charged in Counts I and IV, but was convicted on Counts II and III.

At sentencing, the following colloquy occurred:

> THE COURT: There are two points for count two and count three for a total of fourteen. There is no adjustment for accept-

ance of responsibility. And the Government is moving for a departure upward.

MR. BECKER [AUSA]: Not strictly a departure, but two point enhancement for two different occasions for a total of four points enhancement for obstructing justice by providing false testimony before this court once during the suppression hearing and once during his testimony at trial.

THE COURT: You wish to be heard on it?

MR. NOVAK [Petitioner's counsel]: Your Honor, we do not feel that the Government in this particular motion has given any reason for an obstruction of justice. If I'm not mistaken the guidelines speak to the interference with the administration of justice. It would appear that all of these matters that Mr. Becker has handled before this Court--

> THE COURT: I don't know that you should waste any time arguing this because *I'm not going to allow any departure upward for two and a half points for some obstruction of justice.* Mr. Becker indicates--I was here. I heard of the testimony. I know what the testimony was. I'm satisfied I know what my responsibility is and how to discharge it. This man is a liar is what he is.

SENT 2-3 (emphasis added). That sentence was based upon the factual findings and guideline application set out in the presentence investigation. See Judgment at 5; A-63.

The appellate court upheld petitioner's sentence, concluding that the district court's guidelines calculation was accurate and the sentence appropriate, because the upward departure was for obstruction rather

than grouping, as the presentence report recommended. Op. at 18-20; A-34-36.

REASONS FOR GRANTING THE WRIT

I. A SUBSTANTIAL QUESTION IS PRESENTED AS TO WHETHER A SENTENCE ENHANCEMENT FOR OBSTRUCTION, PURSUANT TO U.S.S.G. § 3C1.1, MUST BE VACATED IN THE ABSENCE OF A SPECIFIC FINDING THAT ENCOMPASSES ALL OF THE ELEMENTS OF PERJURY, PURSUANT TO THIS COURT'S HOLDING IN *UNITED STATES v. DUNNIGAN*, 113 S. Ct. 1111 (1993).

Last term, in United States v. Dunnigan, ___ U.S. __, 113 S. Ct. 1111 (1993), this Court held that in order to impose a sentence enhancement for obstruction under U.S.S.G. § 3C1.1 based upon a defendant's trial testimony, the district court must first make specific findings that all of the elements of perjury are present. In Dunnigan, it was not necessary for the Court to address the level of specificity required, because the

trial judge had articulated detailed reasons for its decision to impose the enhancement.

In the case at bar, no finding of obstruction was ever made by the district court. Rather, the possibility that petitioner's sentence was enhanced for obstruction was interposed for the first time in the court of appeals. Specifically, the appellate court held that the transcript of the sentencing hearing "indicates that the district judge ... added a two level enhancement for obstruction of justice (U.S.S.G. § 3C1.1)." A-35; Op. at 19.

That conclusion, however, is diametrically opposed to the district court's statement that it was not enhancing the sentence for obstruction, and the plain language of the judgment that the Guidelines calculation in the presentence investigation was being followed. In light of the failure of the district court to make a Dunnigan finding, and the district court's

express statement that overruled the government's request to apply § 3C1.1, there was no basis upon which petitioner could have concluded that his sentence was enhanced under § 3C1.1 in the first instance.

Indeed, the appellate court went so far as to state that petitioner did not challenge the two-level enhancement for obstruction. But in light of the district court's express statement that overruled the government's request to apply § 3C1.1, there was no basis upon which petitioner could have concluded that his sentence had, in fact, been enhanced under § 3C1.1, as the circuit court held.

By resolving the issue in this manner, the court below departed so far from the accepted and usual course of judicial proceedings, this Court should grant a writ of certiorari to correct this fundamental error.

II. AN IMPORTANT QUESTION IS PRESENTED AS TO WHEN AN APPELLATE COURT IS REQUIRED TO REMAND A CASE FOR FURTHER PROCEEDINGS RATHER THAN EXAMINE THE RECORD AND RULE *DE NOVO*.

This case presents an important question as to the degree of de novo fact finding in which an appellate court may engage without violating this Court's holdings in Maine v. Taylor, 477 U.S. 131 (1986).

Specifically, one of the issues raised by petitioner in the court of appeals involved the suppression of his February 11, 1988 statements pursuant to Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410, and more particularly, the failure of the district court to rule on this crucial issue as required by Fed. R. Crim. P. 12(e). For, although an evidentiary was held on the petitioner's motion to suppress evidence, the district court only decided the issue as to whether the petitioner's February 11th statements were voluntary

or coerced. It failed to decide whether the statements were made "in the course of plea discussions," and thus, not admissible under Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6).

Notwithstanding this failure of the district court to rule, the court of appeals, upon a review of the record excerpts in the joint appendix, concluded that on the merits, the district court could have found that the statements were made after a plea agreement having been entered, and therefore, were admissible under the rules.

This Court has repeatedly held that factual issues should be disposed of initially by the district courts and not by the courts of appeals. Maine v. Taylor, 477 U.S. 131, 144-451 (1986); Pullman-Standard v. Swint, 456 U.S. 273, 291-92 (1982); DeMarco v. United States, 415 U.S. 449 (1974)(per curiam). Indeed, in Taylor, the Court specifically held that the policy consider-

ations underlying Fed. R. Civ. P. 52(a) are applicable in criminal cases to review factual findings unrelated to the question of guilt or innocence, which findings will not be disturbed by an appellate court unless "clearly erroneous". Id. at 145.

The Court also long recognized that where there is an absence of fact finding by the district court on a particular issue, "the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing factual findings...." Pullman-Standard v. Swint, 456 U.S. 273, 291 (1982).

In DeMarco v. United States, 415 U.S. 449 (1974), a close factual question on which the record was ambiguous was presented as to whether a witness against DeMarco had entered into a plea bargain before or after he testified. The appellate court examined the record, and found, as a factual matter,

for the first time in the case, that the plea bargain had been entered after the testimony.

This Court vacated the appellate decision in a summary decision and remanded the case to that court with an order to send the case to the district court for further proceedings.

In the instant case, the court of appeals' opinion demonstrates that the evidence was ambiguous as to whether a plea agreement had been reached at the time petitioner spoke to the government attorneys on February 11, 1988. Petitioner's attorney could not testify that a plea agreement had definitely been entered into at the time the statements were made. According to the appellate court, however, petitioner believed an agreement had been reached. Op. at 11; A-19-20. Nonetheless, instead of remanding the case, the appellate court ruled on the merits of the issue despite the absence of any findings by the district court.

A writ of certiorari should be granted to answer the important question about the limits of appellate court jurisdiction to make de novo factual findings.

III. A SIGNIFICANT QUESTION IS PRESENTED AS TO WHETHER FED. R. CRIM. P. 11(e)(6) AND FED. R. EVID. 410 PROHIBIT THE INTRODUCTION AT TRIAL OF PRE-INDICTMENT STATEMENTS MADE BY AN ACCUSED IN THE COURSE OF PLEA BARGAIN DISCUSSIONS OR AGREEMENTS THAT DO NOT RESULT IN A GUILTY PLEA.

The court of appeals in the case at bar, after finding de novo that a plea agreement had been reached between the petitioner and the government, held that because the petitioner's statements were made subsequent to the agreement, neither the Federal Rules of Evidence Rules nor the Criminal Rules were violated by the admission of petitioner's February 11th statements.

Assuming arguendo that an agreement had been reached between petitioner and the government, whether statements made pursuant to a plea agreement are admissible under the Rules if an accused elects to cease cooperating and take his chances at trial is a question on which the courts of appeals are divided. The Sixth Circuit's decision in the case at bar followed those of the District of Columbia Court of Appeals, United States v. Davis, 617 F.2d 677, 685 (D.C. Cir. 1979), cert. denied sub nom. Gelestino v. United States, 445 U.S. 967 (1980); the Second Circuit, United States v. Stirling, 571 F.2d 708 (2d Cir.), cert. denied, 439 U.S. 824 (1978), and the Eleventh Circuit, United States v. Knight, 867 F.2d 1285 (11th Cir. 1989).

By way of contrast, in United States v. Grant, 622 F.2d 308 (8th Cir. 1980), the Eighth Circuit reached a contrary conclusion, holding "If statements made by an

accused person during plea bargain negotiations are admissible if that person decides to change the plea after the plea bargain is struck, Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410 would be so circumscribed in their applicable scope that the rules would be rendered effectually meaningless." Id. at 315.

The ramifications of the Sixth Circuit's decision in this case is to impede the plea bargain process by "locking in" both those who are accused of crimes and those, like petitioner, who provide information to the government in the pre-indictment stage, but later decide the decision to do so was in error. A writ of certiorari should be issued to resolve this important issue

CONCLUSION

For the foregoing reasons, petitioner, George Santosuosso, urges the Court to grant his petition for a writ of certiorari.

Respectfully submitted,

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NOT RECOMMENDED FOR PUBLICATION

No. 91-3943

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	FILED:
	)	Feb. 25, 1994
Plaintiff-Appellee	)	Leonard Green,
	)	Clerk
v.	)	
	)	ON APPEAL FROM
GEORGE E. SANTOSU-OSSO,	)	THE UNITED STATES
	)	DISTRICT COURT
	)	FOR THE NORTHERN
Defendant-Appellant	)	DISTRICT OF OHIO

BEFORE: MILBURN and BOGGS, Circuit Judges; and MILES, Senior District Judge.*

PER CURIAM. Defendant-appellant George Santosuosso appeals his jury conviction and sentence for perjury, in violation of 18 U.S.C. § 1623. We affirm.

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*The Honorable Wendell A. Miles, Senior United States District Judge for the Western District of Michigan, sitting by designation.

I

A joint investigation conducted by the FBI and IRS into sports gambling activities in the Cleveland, Ohio, area implicated Santosuosso. In September 1987, search warrants were executed on the bookmaking operation of Emmett "Lucky" Taylor. Bookmaking records were seized from the operation's[2] main office, from Taylor's home, and from the homes of Taylor's associates, Wally Overko and Larry Dedor. Tape recordings were seized from the homes of Taylor and Overko; additional tape recordings were obtained from the Cleveland police department, which had seized tapes from Overko's bookmaking office in 1985. Additional warrants were executed in

December 1987, leading to the seizure of more records.

Dedor testified at trial that Santosuosso wagered $500 to $1500 per game. FBI Special Agent John Sommer testified that Santosuosso admitted, on February 11, 1988, to betting on up to twenty games a week, often carrying a $2500 to $4000 balance, having "45" as a code number, and having wagered with Taylor for four years. Sommer testified that Santosuosso admitted that he acted as a go-between for Taylor and bettor, Ted Busch, the former mayor of Westlake, Ohio. Dedor testified that, in return for Santosuosso's services, Taylor shared the profits from Busch's betting with Santosuosso. Busch testified that

Santosuosso tried to collect the overdue gambling debts that Busch owed to Taylor.

Santosuosso appeared with counsel (John Henck) before the grand jury on February 2, 1988. Santosuosso testified that he knew Taylor was a bookmaker, had known him for two years, and had first placed a bet with him about a year before, but did not have a code number (these statements constitute the basis[3] of count 1 of the indictment). Santosuosso further testified that he had never accepted bets for Taylor, had never acted as a go-between for bets that ultimately would be placed with Taylor, and doubted that his (Santosuosso's) brother Michael was a bookmaker, even though he did have a "gambling problem" (count 2). Santosuosso also testified that he made only

"minimal bets" of $50 with Taylor and that it was "[h]ard to say" if he had bet more than one game at a time (count 3). Finally, Santosuosso testified that he had heard of Busch, but did not know him personally and did not think he had spoken on the phone with him (count 4). The indictment also charged Santosuosso with participation in an illegal gambling business (count 5).

Shortly thereafter, Special United States Attorney Michael Rae of the Organized Crime Strike Force arranged a meeting with Santosuosso to supplement or correct his grand jury testimony, based upon information he had received and his belief that Santosuosso had committed perjury. The meeting was held February 4,

1988, at Henck's office; Santosuosso, Henck, Rae, Sommer, and IRS Special Agent Ed Licht were present. With one minor exception, Santosuosso declined to alter his grand jury testimony. In order to "test" Santosuosso's veracity, Rae casually asked Santosuosso at the coffee machine if he would produce voice exemplars for[4] purposes of comparison with other tapes the government had; Rae repeated his request to Henck. Rae claims he never told Santosuosso or Henck that the government had tapes with Santosuosso's voice; Santosuosso insists that Rae falsely stated that he did have such tapes.

The next day, Agent Licht informed Rae that Taylor's records indicated that Santosuosso had a code number (#45) and had a

$5225 balance in Taylor's books. Rae informed Henck of this newly discovered evidence, informed him that Santosuosso would be charged with perjury, and agreed to meet on February 11 to discuss the matter. At that meeting, Santosuosso was shown the records. Santosuosso agreed to a plea proposed by Rae: if Santosuosso would be totally cooperative and truthful, he would be charged with only one count of perjury and the Government would inform the sentencing court of his cooperation. Santosuosso then provided a statement in which he acknowledged that he was code number 45, that he was a large bettor ($500 per game, several games per week), that for a profit he helped Taylor take bets from Busch, and that he had called Busch ten to twenty

time, left messages for him, and spoken with him at least once in an attempt to collect an overdue gambling debt for Taylor. Santosuosso agreed to provide this information under oath to the grand jury.

At a meeting on February 25, 1988, arranged to prepare[5] Santosuosso for his reappearance before the grand jury, Santosuosso breached the plea agreement by refusing to answer questions about other bookmakers. Santosuosso, after consulting with his lawyer, told the Government that matters were terminated. On October 9, 1990, Santosuosso was indicted on four counts of perjury and one count of participation in Taylor's gambling business.

On December 10, 1990, Santosuosso again engaged in plea negotiations. The govern-

ment now knew that the tapes it had with a conversation with "George" and with "#45" did not contain Santosuosso's voice; Santosuosso's lawyer listened to the tapes and agreed. Santosuosso agreed to be interviewed before entering a plea agreement, but provided essentially the same information regarding Taylor as he provided on February 11, 1988. A plea agreement was made, and on December 11, Santosuosso pleaded not guilty to participating in the illegal gambling business. After obtaining new counsel, however, Santosuosso was permitted by the court to withdraw his guilty plea. Santosuosso then moved to suppress the February 1988 statements on the ground that they were obtained during the course of plea negotiations and thus were not

admissible into evidence under Fed. R. Crim. P. 11(e)(6).

On March 27, 1991, the court held a hearing on the motion to suppress the statements. Santosuosso argued that they [6]should be suppressed because they were made in reliance on Rae's false statement, in violation of professional ethics, that he had Santosuosso on tape. Rae testified at the hearing that he never said that Santosuosso was on tape; Sommer testified that tapes of Santosuosso were never mentioned; Henck testified that he had been "uncertain" as to whether Santosuosso was on tape and did not recall anyone expressly stating that he was; and Santosuosso testified that he provided information because he thought the Government had him on tape

and that the information he provided was false, even though he was supposed to present that same information under oath to the grand jury. Santosuosso also acknowledged that he entered the same plea agreement in December 1990 even though he and his lawyers were fully apprised that he was not on tape. The district judge denied the motion to suppress the statements, finding that Rae had made no false statements to Santosuosso and therefore did not intentionally mislead him or violate ethical standards, and that Santosuosso's statements had been made voluntarily.

At trial, Santosuosso contended that Rae and the federal agents had coerced him into making the February 11 statements by threatening to take all his belongings,

take him away from his family, and imprison him for a long time under RICO. Sommer testified that RICO had never been mentioned in the[7] February 1988 meetings. Santosuosso at trial admitted that he entered the February 11 pleas agreement and that he breached it on February 25.

The Government also introduced at trial the testimony of Steven Bucha, another bookmaker apparently unaffiliated with Taylor. Bucha testified that Santosuosso had placed bets with him in the past at Bucha's $300 limit.

After charging the jury, the district court did not discharge the two alternate jurors but, instead, permitted them to retire with the jury and observe the jury's deliberations. The judge's reason for doing

so apparently was that if a juror had to leave, one of the alternates could be substituted. The district judge first instructed the alternates not to participate, but the transcript indicates that only one of the two alternates verbally expressed understanding the judge's instruction. Santosuosso raised no objection at the time.

The jury found Santosuosso guilty of counts 2 and 3, but acquitted him on counts 1 and 4. The district court had granted Santosuosso's motion for judgment of acquittal on the gambling count. The district court sentenced Santosuosso to 21 months' incarceration and three years' supervised[8] release, and fined him $40,000[1]

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[1] The transcript of the sentencing hearing indicates that the district judge (continued...)

and the $100 special assessment. Santosuosso appeals to this court. He argues that the district court erred in denying his motion to suppress, in admitting Bucha's testimony, in permitting the alternate jurors to retire with the jury when it deliberated, in ruling as a matter of law on the materiality of the perjurious statement, and in calculating his offense level under the sentencing guidelines. We address each contention in turn.

II

A

Santosuosso argues that Rae violated Rule 7-102(A)(5) of the American Bar Asso-

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[1](...continued)
imposed a fine of $10,000, J.A. at 419, but the judgment indicates a $40,000 fine, J.A. at 41. The parties do not challenge or discuss this apparent discrepancy.

ciation Code of Professional Responsibility, which prohibits a lawyer from knowingly making a false statement of law or fact, and that therefore his statements should be suppressed. He argues that Rae's admission that he wanted to "test" him is evidence that the district court's finding was clearly erroneous. Further, Santosuosso points to the transcript from the hearing on his motion for an appeal bond, in which the district judge indicates that he "allow [ed] anger over a plea that was made[9] [but withdrawn] to influence a decision," that he had inadvertently overlooked the conversation between Rae and Santosuosso at the coffee machine, that he was "disturb[ed]" by the government's tactics to get evidence against Taylor, that

he was "concerned about the tapes, the hearing to suppress ... the statement made, [which] might have had an effect on the verdict," and that he had "great concern over the conduct of [Rae]." J.A. at 422-24, 438. Santosuosso also seeks reversal on the ground that the statements were obtained during the course of plea discussions and thus were inadmissible under Fed. R. Crim. P. 11(e)(6)(D) and Fed. R. Evid. 410.

We accept the findings of fact upon which the district court relied in dealing with suppression of evidence unless those findings are clearly erroneous, United States v. French, 974 F.2d 687, 691 (6th Cir. 1992), cert. denied, 113 S. Ct. 1012 (1993), and uphold the district court's

evidentiary rulings absent a clear showing of abuse of discretion, United States v. Taplin, 954 F.2d 1256, 1258 (6th Cir. 1992). We accord considerable deference to the credibility findings of the district court. United States v. Cooke, 915 F.2d 250, 252 (6th Cir. 1990).

The district court, following the suppression hearing, found that Rae did not falsely state that he had Santosuosso[10] on tape and did not intentionally mislead Santosuosso; the district court based its conclusions on the testimony of Rae (who said he did not tell Santosuosso or Henck that he had Santosuosso on tape), Sommer (who testified that he did not hear Rae or anyone say that the government had Santosuosso on tape), and Henck (who could not

recall being told that the government in fact had Santosuosso on tape). Thus, the district court rejected the testimony of Santosuosso. The district court further found that the statements had been made voluntarily. Given the importance of credibility determinations here, a review of the transcript of the suppression hearing supports the conclusion that these findings are not clearly erroneous.

The record also indicates that the plea agreement had already been made prior to Santosuosso's statements and therefore the statements were made after, not during the course of, plea negotiations. At the suppression hearing, Santosuosso stated that the agreement was that he would be charged with only one count of perjury in exchange

for "100 percent cooperation" in providing information. J.A. at 101. He stated that he made admissions "because I had to be 100 percent truthful with [the investigators]." J.A. at 105. He testified that he acknowledged at the February 11 meeting that he was code number 45 with Taylor "because it was evidence[11] that you [the prosecutor] said you had, and I had to give you the 100 percent truth." J.A. at 109. These statements suggest that the agreement had been made and that Santosuosso was complying with its terms. He further testified that he had "agreed to plead guilty to one count of perjury," J.A. at 111, and that "[a]fter supposedly accepting one count of perjury, they asked me questions about conversations with Mr. Busch." J.A. at 108. From Santo-

suosso's testimony alone, then, it is clear that the plea had been agreed to, and Santosuosso was providing the information in accordance with the terms of the agreement--i.e., after the negotiations were over.

Henck's testimony does not indicate clearly one way or the other whether the statements made by Santosuosso were in the course of plea negotiations or after an agreement had been made. Rae's testimony indicates that the statements were made after Santosuosso had agreed to plead guilty. J.A. at 172, 174. Thus, there is sufficient evidence in the record for the district court to have found that the plea had been agreed to before the statements were made.

Santosuosso places great weight on certain statements made by the district judge at the appeal bond hearing. We note that such ruminations are of no legal effect. While the district judge did express some concern over the circumstances[12] under which Santosuosso's February 11, 1988, statements were made, he apparently determined that the circumstances were not so egregious as to warrant reversing his earlier findings that Santosuosso's statements had been made voluntarily and that Rae had not intentionally misled him. The district judge did not grant Santosuosso's motion for judgment of acquittal, which he had the power to do. A court speaks by its judgments, and any other discussion, how-

ever intended, does not overpower or undermine the court's own rulings.

The district court's denial of Santosuosso's motion to suppress is affirmed. We note that counsel for the Government indicated at oral argument that, in the Northern District of Ohio, the United States Attorney now reduces all plea agreements to writing. We recommend that all prosecutors take similar steps in making plea agreements in order to avoid raising any doubts as to whether agreements have been made.

B

Santosuosso argues that Bucha's testimony that Santosuosso placed large and frequent bets with him should have been ruled inadmissible under Fed. R. Evid. 404(b), which prohibits admission of

"[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith." Santosuosso also argues that [13]there was no connection shown between Bucha and Taylor.

Santosuosso admitted placing bets with, among others, Bucha. Thus, Bucha's testimony was relevant insofar as it helped establish or corroborate the amounts of the bets placed by Santosuosso, which is directly at issue in count 3 of the indictment. Bucha's testimony also corroborated the testimony of others who testified to the amounts of the bets placed by Santosuosso. Further, in cross-examining Bucha, defense counsel, in an effort to discredit Bucha's testimony by impeaching his memory,

questioned Bucha as to the amount of the bets placed by Santosuosso, suggesting that defense counsel recognized the relevance of Bucha's testimony. Finally, Sommer's testimony suggests a connection between Bucha's operation and Taylor's. Because Bucha's testimony was thus relevant to the charges against Santosuosso, we hold that the district court did not abuse its discretion in admitting Bucha's testimony.

C

Santosuosso next argues that the district court erred in permitting the alternate jurors to retire with the jury when it deliberated, citing Fed. R. Crim. P. 24(c), which requires that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to

consider[14] its verdict." Santosuosso relies solely on United States v. Olano, 113 S.Ct. 1770 (1993).

Olano addressed the question of whether the presence of alternate jurors during jury deliberations is a "plain error" requiring correction by the court of appeals. The trial court in Olano had allowed the two alternate jurors to sit with the jury during deliberations, but instructed them not to participate; defense counsel made no objection at the time. The Supreme Court concluded that the "presence of alternate jurors during jury deliberations is not the kind of error that 'affect[s] substantial rights' independent of its prejudicial impact." 113 S. Ct. at 1779 (quoting Fed. R. Crim. P. 52(b)). A defendant must make a

specific showing of prejudice for the alternate jurors' presence to be plain error. The "ultimate inquiry" is whether the jury's deliberations, and thereby its verdict, were affected. Id. at 1780.

Here, like the defendants in Olano, Santosuosso has made no specific showing that the alternate jurors either participated in the jury's deliberations or "chilled" the regular jurors' deliberations. The Court in Olano rejected the same arguments pressed by Santosuosso here. The Court specifically rejected the appellate court's finding that the error was inherently prejudicial. The Court noted that the alternate jurors were "indistinguishable" from the regular [15]jurors (having taken an oath, received the normal initial admonishment, heard the

same evidence and arguments, and not having been identified as alternates until after the final set of instructions). Further, jurors are presumed to follow the court's instructions. Finally, the Court stated that the mere presence of alternate jurors did not entail a sufficient risk of chill to justify a presumption of prejudice. Id. at 1781.

Santosuosso's case differs slightly in that the alternate jurors were identified from the outset. Santosuosso argues that they therefore heard the evidence with less attention than the regular jurors and were like mere strangers sitting in on the deliberations. We are not persuaded. Santosuosso cites no authority that would indicate that alternate jurors so identified would

fail to follow the district court's instructions or would disregard their oaths. Further, Fed. R. Crim. P. 24(c) specifically allows alternate jurors, who are routinely identified as being alternates, to "replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties." Thus, Fed. R. Crim. P. 24(c) contemplates that alternate jurors will hear the evidence and arguments with the same attention as regular jurors. Without a specific showing of prejudice, the same result as in Olano obtains here.

[16]**D**

Santosuosso argues that the district court erred in ruling as a matter of law on

the materiality of the perjurious statements, violating the due process requirement that a jury find each element of a crime beyond a reasonable doubt in order to convict. Materiality of the allegedly perjurious statements is an essential element of the offense of perjury. United States v. Adams, 870 F.2d 1140, 1146-47 (6th Cir. 1989). After instructing the jury on the elements of perjury,[2] the district judge told the jury: "The materiality of the testimony alleged to be false is not a matter with which you are to be concerned, but is rather a question for the Court to decide. You are instructed as a matter of

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[2] The essential elements of 18 U.S.C. § 1623 are that the defendant testified under oath before a grand jury, that he made materially false declarations, and that he acted knowingly.

law the declarations alleged in the indictment as false concerned matters material to the investigation of the grand jury." J.A. at 399-400.

This court has held that the question of materiality in a perjury case is one of law for the court to decide. United States v. Seltzer, 794 F.2d 1114, 1123 (6th Cir. 1986), cert. denied, 479 U.S. 1054, 107 S. Ct. 927 (1987); United State v. Giacalone, 587 F.2d 5, 6 (6th Cir. 1978), cert. denied, 442[17] U.S. 940, 99 S. Ct. 2882 (1979). See also Sinclair v. United States, 279 U.S. 263, 298-99, 49 S. Ct. 268, 273-74 (1929)(materiality of allegedly perjurious statement is a question of law for the court).

Santosuosso relies primarily on United States v. Taylor, 693 F. Supp. 828 (N.D. Cal. 1988), which, after examining the sources of the rule that materiality is for the court, concluded that there is no analytical support for that rule. Because one panel of this court cannot overrule the decision of another panel, absent an intervening Supreme Court decision, Meeks v. Illinois Central Gulf R.R., 738 F.2d 748, 751 (6th Cir. 1984), we are bound by the decisions in Seltzer, Giacalone, and the other Sixth Circuit cases upholding the materiality rule at issue here.[3] We note,

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[3] Nor does Taylor appear to be an accurate statement of the law in the Ninth Circuit. See United States v. Martinez, 855 F.2d 621, 623-24 (9th Cir. 1988)(materiality is question of law for court under 18 U.S.C. § 1623); United States v. (continued...)

too, that while "the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality"--i.e., whether a statement is of legal consequence--"turns on an interpretation of substantive law," which is a matter of law for the courts to decide. United States v. Abadi, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821, 104 S.[18] Ct. 86 (1983)(quoted with approval in Kungys v. United States, 485 U.S. 759, 772, 108 S. Ct. 1537, 1547 (1988)). Thus, there is analytical support for the rule.

Because Santosuosso does not challenge the district court's ruling on the merits

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[3](...continued)
Clark, 918 F.2d 843, 845-46 (9th Cir. 1990)(materiality is question of law for court under 18 U.S.C. § 1621 (general perjury statute)).

of whether the statements were material, we hold that the district court did not err in instructing the jury on the element of materiality.

E

Finally, Santosuosso argues that the two counts of perjury should have been grouped together for sentencing purposes pursuant to U.S.S.G. § 3D1.2. Santosuosso correctly points out that the presentence report erroneously stated that § 3D1.2(d) specifically excludes these perjury charges from grouping. Had the counts been grouped, Santosuosso contends, he would have had a lower total offense level (twelve, rather than fourteen) and thus been eligible for a lower sentencing range (ten-to-sixteen

months, rather than fifteen-to-twenty-one months).

Guideline interpretation is a question of law subject to de novo review. United States v. Beckner, 983 F.2d 1380, 1383 (6th Cir. 1993). Here, the base offense level for perjury is twelve. U.S.S.G. § 2J1.3(a). Santosuosso was convicted of two counts of perjury for false testimony given during a [19]single grand jury proceeding. The district court should group multiple counts into one group if they are closely related counts, pursuant to the rules in § 3D1.2. U.S.S.G. § 3D1.1(a)(1). After the counts are appropriately grouped, the offense level is then calculated pursuant to § 3D1.3. U.S.S.G. § 3D1.1(a)(2).

The transcript of the sentencing hearing indicates that the district judge grouped both counts into one single group for a base level of twelve (U.S.S.G. § 2J1.3(a)) and added a two-level enhancement for obstruction of justice (U.S.S.G. § 3C1.1), for a total offense level of fourteen. J.A. at 416. The district judge did not group the two counts into two groups of distinct offenses, which would have yielded a total offense level of sixteen (base offense level of twelve for one group pursuant to § 2J1.3, plus two-level enhancement under § 3D1.3 for two groups of offenses, plus two-level enhancement under § 3C1.1 for obstruction of justice). Thus, while the presentence report's conclusion regarding § 3D1.2(d) was incorrect, the district judge

properly applied the guidelines. Santosuosso does not challenge in his appeal to this court the two-level enhancement for obstruction of justice, so we shall not disturb the district court's calculation.

[20]**III**

For the foregoing reasons, Santosuosso's convictions and sentence are **AFFIRMED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	Docket No. 1:90CR267
vs.	)	Cleveland, Ohio
	)	September 27, 1991
GEORGE SANTOSUOSSO, Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN M. MANOS

APPEARANCES FOR THE PLAINTIFF:
Robert Becker, Esq.
Assistant U.S. Attorney
1800 Bank One Center
600 Superior Avenue East
Cleveland, OH 44114-2600

FOR THE DEFENDANT:
William Novak, Esq.
Frank Celebrezze, Esq.

COURT REPORTER:
Cynthia D. Lee, RPR
Official Court Reporter
201 Superior Avenue
Room 539
Cleveland, OH 44114-1201

Recorded by mechanical stenography: transcript produced by computer-aided transcription.

THE COURT: I have the pre-sentence report. I have perused it. The testimony in the trial actually should constitute separate obstructions of justice. Enhancement of two points for each. That's all. It should be two points at most. The base offense level is twelve. You checked the guidelines?

MR. NOVAK: Yes, sir.

THE COURT: There are two points for count two and count three for a total of fourteen. There is no adjustment for acceptance of responsibility. And the Government is moving for a departure upward.

MR. BECKER: Not strictly a departure, but two point enhancement for two different occasions for a total of four points enhancement for obstructing justice by providing false testimony before this court

once during the suppression hearing and once during his testimony at trial.

THE COURT: You wish to be heard on it?

MR. NOVAK: Your Honor, we do not feel that the Government in this particular motion has given any reason for an obstruction of justice. If I'm not mistaken the guidelines speak to the interference with the administration of justice. It would appear that all of these matters that Mr. Becker has handled before this Court --

THE COURT: I don't know that you should waste any time arguing this because I'm not going to allow any departure upward for two and a half points for some obstruction of justice Mr. Beck indicates--I was here. I heard of the testimony. I know what the testimony was. I'm satisfied I know what my responsibility is and how to discharge it. This man is a liar is what he is.

Is there anything you have to say before this Court imposes sentence?

THE DEFENDANT: No, your Honor.

MR. NOVAK: If the Court please, the jury has found our client Mr. Santosuosso guilty of two counts. The Court is well aware that this was a five count indictment. This Court is well aware of how this matter came before the Grand Jury, turned these charges, the number of times that this man was interrogated by the government, the manner in which he first entered a plea, under what later came to be coercion or duress, and this Court in its wisdom granted him a trial and gave him what we perceive to be a fair trial.

The jury found him guilty. We took exception with that. We filed a motion under Rule 29, which the court this afternoon denied. And we appreciate the court's reasons for the denial.

We have had an opportunity to go through them, although not thoroughly. This man is now before the court for sentencing under the law. And we are aware of the guidelines that have been established for sentencing before this tribunal.

We feel, your Honor, that this is a man in an incident that is deserving of the court's consideration. And someplace within the guidelines it says that the court does not have to if the court finds that there is a reason, I'm not sure that the court even has to state its reason for the record, but that this court can use its own discretion and judgment when viewing the character and background of the individual before this court for sentencing to put this man on probation.

THE COURT: I question whether you read some of the recent circuit decisions?

MR. NOVAK: I beg your pardon?

THE COURT: I question whether you have read some of the recent circuit decisions in that connection? The guidelines give the judge no discretion. That's the difficulty with the guidelines.

MR. NOVAK: I confess, your Honor, that I have only gone through the guidelines. I saw a few places in the guidelines where you can depart.

THE COURT: The guidelines doe not permit the judge discretion in any manner. We have a mathematical computation to make. And we make it.

The range is 15 to 21 months. The statutory fine is $250,000. And the recommendation is that I impose a $40,000 fine, supervised release.

I commit you to the custody of the attorney general for 21 months. I fine you $10,000. I impose statutory release three years. And I fine you $100 special assess-

ment pursuant to the assessment statute for each count in which you were convicted guilty.

This is the imposition of the court. This man deserves no consideration from the court, and he knows the reasons for that statement.

MR. NOVAK: Well, your Honor, then at this point we would like to ask the court if we may file a notice of appeal and if our--if this defendant can remain at liberty on the same bond.

THE COURT: No, he will not remain at liberty on bond until the appeal is filed. I have the choice to commit him to the immediate custody of the marshals, commit him to the immediate custody and send him to the institution to which he will be confined, or on a motion duly made we will allow him to admit himself when the

arrangements are made to the institution to which he is sent.

MR. NOVAK: We'll so move.

THE COURT: I'll grant you that motion. He will remain out on the same bond. And as soon as the marshals determine the institution to which he is to be assigned you may notify the defendant and he will present himself on his own accord.

So order.

Anything further?

MR. NOVAK: Nothing further, your Honor.

THE COURT: We are recessed.

(Court Adjourned.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Cynthia D. Lee
Cynthia D. Lee,
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 1:90CR267
	)	
	)	Judge John M.Manos
Plaintiff,	)	
vs.	)	**[Filed: 91 Apr 19 AM 8:23]**
	)	
GEORGE SANTOSUOSSO,	)	MEMORANDUM OF OPINION
	)	
Defendant.	)	

On October 9, 1990, a federal grand jury returned an indictment against George E. Santosuosso, defendant, charging him with four counts of perjury in violation of 18 U.S.C.A. § 1623 (West 1984) and one count of participating in an illegal gambling business in violation 18 U.S.C.A. § 1955 (West 1984) and 18 U.S.C.A. § 2 (West 1969). Santosuosso filed a motion to suppress a pre-indictment statement he made to Michael Rae, a former federal prosecutor assigned to the Organized Crime Strike

Force, because it was coerced through prosecutorial misconduct. On March 26, 1991, the court held a hearing on the motion to suppress. For the following reasons, the motion is denied.

I

In his motion, Santosuosso alleges that during a meeting on February 11, 1988, Rae told him that the government had him on tape. He says that this caused him to become so confused that he made an incriminating statement. He says further that Rae falsely told him that he had him on tape to coerce the statement from him. [2]He charges that this prosecutorial misconduct requires suppression of his statement of February 11, 1990[sic].

II. Findings of Fact

The evidence established the following:

Michael Rae testified about his role in the case. He said that in 1987, the United

States Department of Justice was investigating an illegal gambling operation allegedly conducted by Lucky Taylor. In December 1987, a search was made of Taylor's residence. From the search, Rae obtained information implicating Santosuosso in Taylor's gambling operation.

Subsequent to the search, Rae initiated a grand jury investigation, and on February 2, 1988, Santosuosso was subpoenaed to testify. Because his grand jury testimony contradicted that of other witnesses, Rae asked for a meeting. On February 4, 1988, Rae met with Santosuosso and Jonathan Henck, Santosuosso's attorney. After some discussion, Santosuosso gave information which Rae believed differed from his grand jury testimony.

Soon thereafter, Ed Licht, a Special Agent for the Internal Revenue Service also investigating Taylor, told Rae that the

government had seized a book containing telephone numbers and a ledger of accounts from the search of Taylor's residence. Santosuosso's home and work numbers were in the book. The ledger contained "No. 45" next to Santosuosso's name and showed that "No. 45" owed more than $5,000.

Upon receiving this information, Rae arranged to meet with Santosuosso and Henck and did so on February 11, 1988. Rae testified that at this meeting he told Santosuosso that the government possessed records incriminating him. Rae [3]testified further that he did not tell Santosuosso or Henck that the government had Santosuosso on tape.

John Sommer, an FBI agent assigned to the Taylor investigation, was present at all meetings between Rae and Santosuosso. Sommer testified that he did not hear Rae

or anyone say that the government had Santosuosso on tape.

Jonathan Henck, Santosuosso's lawyer, testified that at the beginning of the February 11 meeting, Santosuosso was afforded the opportunity to plead guilty to one count of perjury providing he gave a statement that was 100% truthful. Henck said that he and Santosuosso discussed the nature of the perjury charge of which his client was suspected. Although Henck believed that the government had Santosuosso on tape, he could not recall being told that the government, in fact, had such a tape.

The court finds that Rae did not have Santosuosso on tape and did not falsely state that he did. Accordingly, the court finds that Rae did not intentionally mislead Santosuosso.

III. Conclusions of Law

Suppression of a statement is an appropriate remedy when the statement was elicited by conduct violating a code of professional responsibility. United States v. Hammad, 858 F.2d 834, 840-42 (2d Cir. 1988), cert. denied, ___ U.S. ___, 111 S. Ct. 192 (1990); United States v. Killian, 639 F.2d 206, 210 (5th Cir. 1981), cert. denied sub nom. Brunk v. United States, 451 U.S. 1021, 101 S. Ct. [4]3014 (1981); United States v. Thomas, 474 F.2d 110, 112 (10th Cir. 1973), cert. denied, 412 U.S. 932, 93 S. Ct. 2758 (1973). "[I]n light of the underlying purposes of the Professional Responsibility Code and the exclusionary rule, suppression may be ordered in the district court's discretion." Hammad, 858 F.2d at 840.

Santosuosso argues that Rae violated Disciplinary Rule 7-102(A)(5) of the Model

Code of Professional Responsibility[1] and Rule 4.1 of the Model Rules of Professional Conduct[2] which prohibit lawyers from making false statements of fact.

Despite Santosuosso's testimony to the contrary, the court finds that Michael Rae did not make a false statement about having Santosuosso on tape, and therefore, did not violate the code of professional responsi-

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[1] Model Code of Professional Responsibility Dr 7-102 (1980) provides in pertinent part:

(A) In his representation of a client, a lawyer shall not:

. . . .

(5) knowingly make a false statement of law or fact.

[2] Model Rules of Professional Conduct Rule 4.1 (1989) provides in pertinent part:

In the course of representing a client a lawyer shall not knowingly;

(a) make a false statement or material fact or law to a third person...

bility. The motion to suppress on this ground is denied.

Notwithstanding the finding above, the court may still exclude Santosuosso's statement if it was not made voluntarily. To decide whether a statement is voluntary, the court must examine the [5]totality of the circumstances to determine whether law enforcement officials have overborne the defendant's will. Schneckloth v. Bustamonte, 412 U.S. 218, 226-27, 93 S. Ct. 2041, 2047 (1973). A statement is not voluntary if elicited "by any sort of threat or violence, [or] by the exertion of any improper influence." Hutto v. Ross, 429 U.S. 28, 31, 97 S. Ct. 202, 203 (1976). The court must examine the conduct of the law enforcement officials and the defendant's capacity to resist the pressure. Colorado v. Connelly, 497 U.S. 157, 107 S.

Ct. 515 (1986); Mincey v. Arizona, 437 U.S. 385, 399-401, 98 S. Ct. 2408 (1978).

Appellate courts have considered many factors in determining whether a statement is voluntary. When a statement is made in a non-custodial setting and before arrest or indictment, it is generally deemed voluntary. See United States v. Jorgensen, 871 F.2d 725 (8th Cir. 1989). Courts have similarly held that promises of leniency or confrontation with evidence of guilt are not sufficiently coercive to render statements involuntary. United States v. Baldacchino, 762 F.2d 170, 178-79 (1st Cir. 1985); Green v. Scully, 850 F.2d 894, 903-04 (2d Cir)., cert. denied, 488 U.S. 945, 109 S. Ct. 374 (1988).

The court finds that the meeting held on February 11, 1988, was non-custodial because Santosuosso attended the meeting voluntarily with his attorney and was per-

mitted to confer privately with him. When they conferred, Santosuosso's attorney apprised him of the nature of the offense of which he was suspected--perjury. [6]Santosuosso's statement was made in the presence of his lawyer. The government's offer of leniency in exchange for truthful testimony and the confrontation with inculpatory evidence did not render the statement voluntary.

IV

Accordingly, the court finds that no violation of professional responsibilty occurred, and therefore, suppression of Santosuosso's statement on this ground is denied. The court finds further that Santosuosso's statement of February 11, 1988, was voluntary. For these reasons, the motion to suppress is denied.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 1:90CR267
	)	
	)	Judge John M.Manos
Plaintiff,	)	
vs.	)	[**Filed: 91 Apr 19 A.M. 8:24**]
	)	
GEORGE SANTOSU-OSSO,	)	ORDER
	)	
Defendant.	)	

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the court finds that no violation of professional responsibility occurred, and therefore, suppression of Santosuosso's statement on this ground is denied. The court finds further that Santosuosso's statement of February 11, 1988, was voluntary. For these reasons, the motion to suppress is denied.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,	**JUDGMENT IN A CRIMINAL CASE** (For Offenses Committed On or After November 1, 1987)
vs.	
GEORGE SANTOSU-OSSO,	Case No. 1:90CR0267-001
Defendant.	Frank Celebreeze and William Novak (Defendant's Attorneys)
	[Filed October 3, 1991]

THE DEFENDANT:

* * *

was found guilty on count(s) 2 and 3 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

TITLE & SECTION	NATURE OF OFFENSE
18:1623(a)	False declarations before Grand Jury or Court, both Class D Felonies

DATE OFFENSE CONCLUDED	COUNT NUMBER(S)
9/27/91	2 and 3

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) 1, 4 and 5.

* * *

It is ordered that the defendant shall pay a special assessment of $100.00 for count(s) 2 and 3, which shall be due __immediately __ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

* * *

Defendant's Date of Birth: March 1, 1953

Defendant's Mailing Address:

1706 Eisenhower Drive
Brunswick, OH 44212

Defendant's Residence Address:

same as above

September 27, 1991
Date of Imposition of Sentence

Signature of Judicial Officer

John M. Manos, U.S. District Judge
Name & Title of Judicial Officer

October 3, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 21 months.

___ The court makes the following recommendations to the Bureau of Prisons:

* * *

_x_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons, as notified by the United States marshal.

RETURN

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) years.

* * *

STATEMENT OF REASONS

_X_ The court adopts the factual findings and guideline application in the presentence report.

OR

___ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

* * *

I hereby certify that this instrument is a true and correct copy of the original on file in my office. Attest Geri M. Smith, Clerk, U.S. District Court Northern District of Ohio.

By _/s/ Karen O. Smith_
Deputy Clerk

Case No. 91-3943

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

FILED
APR 06 1994
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

GEORGE E. SANTOSUOSSO

Defendant-Appellant

BEFORE: MILBURN and BOGGS, Circuit Judges; and MILES, District Judge*

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

---

* The Honorable Wendell A. Miles, Senior U.S. District Judge for the Western District of Michigan, sitting by designation.

SECTION 1623, UNITED STATES CODE

§ 1623. False declarations before grand jury or court.

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more that $10,000 or imprisoned not more than five years, or both.

* * *

Federal Rules of Criminal Procedure

Rule 11. Pleas.

* * *

(e) Plea Agreement Procedure.

* * *

(6) Inadmissibility of Pleas, Plea Discussions and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendre;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a

plea of guilty or which result in a plea of guilty later withdrawn.

* * *

Rule 410. INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

* * *

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

* * *

§2J1.3 Perjury or Subornation of Perjury

(a) Base Offense Level: 12

(b) Specific Offense Characteristics

(1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to suborn perjury, increase by 8 levels.

(2) If the perjury or subornation of perjury resulted in substantial interference with the administration of justice, increase by 3 levels.

(c) Cross Reference

(1) If the offense involved perjury or subornation of perjury in respect to a crimi-

nal offense, apply § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1621-1623. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. "Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation, an indictment or verdict based upon perjury, false testimony, or other false evidence, or the unnecessary expenditure of substantial governmental or court resources.
2. For offenses covered under this section, Chapter Three, Part C (Obstruction) does

not apply, unless the defendant obstructed the investigation or trial of the perjury count.

3. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which he committed perjury), see the Commentary to Chapter Three, Part C (Obstruction), and to § 3D1.2(c) (Groups of Closely Related Counts).

4. If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Background: This section applies to perjury and subornation of perjury, generally prosecuted under the referenced statutes. The guidelines provide a higher penalty for perjury than the pre-guidelines practice estimate of ten months imprisonment. The

Commission believes that perjury should be treated similarly to obstruction of justice. Therefore, the same considerations for enhancing a sentence are applied in the specific offense characteristics, and an alternative reference to the guideline for accessory after the fact is made.

Historic Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 175).

§3C1.1 Obstructing or Impeding the Administration of Justice

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

Commentary

Application Notes:

1. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision, the defend-

ant's testimony and statements should be evaluated in a light most favorable to the defendant.

2. Obstructive conduct can vary widely in nature, degree of planning and seriousness. Application Note 3 sets forth examples of the types of conduct to which this enhancement is intended to apply. Application Note 4 sets forth examples of less seriousness forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in Application Notes 3 and 4 should assist the court in determining whether application of this

enhancement is warranted in a particular case.

3. The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:

   (a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

   (b) committing, suborning, or attempting to suborn perjury;

   (c) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;

   (d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investi-

gation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to swallow or throw away a controlled substance, it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

(e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

(f) providing materially false information to a judge or magistrate.

§3D1.1 Procedure for Determining Offense Level of Multiple Counts

(a) When a defendant has been convicted of more than one count, the court shall:

(1) Group the counts resulting in conviction into distinct Groups of Closely-Related Counts ("Groups") by applying the rules specified in §3D1.2.

(2) Determine the offense level applicable to each Group by applying the rules specified in § 3D1.3.

(3) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in §3D1.4.

(b) Any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of §§3D1.2-3D1.5. Sentences for such counts are governed by the provisions of §5G1.2(a).

Commentary

Application Notes:

1. Counts for which a statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. Convictions on such counts are not used in the determination of a combined offense level under this Part, but may affect the offense level for other counts. A conviction for 18 U.S.C. § 924(c) (use of firearm in commission of a crime of violence) provides a common example. In the case of a conviction under 18 U.S.C. § 924(c), the

specific offense characteristic for weapon use in the primary offense is to be disregarded to avoid double counting. See Commentary to § 2K2.4. Example: The defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together, and the offense level for the bank robbery count is computed without application of an enhancement for weapon possession or use. The mandatory five-year sentence on the weapon-use count runs consecutively, as required by law. See §5G1.2(a).

Background: This section outlines the procedure to be used for determining the combined offense level. After any adjustments from Chapter 3, Part E (Acceptance of

Responsibility) and Chapter 4, Part B (Career Offenders and Criminal Livelihood) are made, this combined offense level is used to determine the guideline sentence range. Chapter Five (Determining the Sentence) discusses how to determine the sentence from the (combined) offense level; § 5G1.2 deals specifically with determining the sentence of imprisonment when convictions on multiple counts are involved. References in Chapter Five (Determining the Sentence) to the "offense level" should be treated as referring to the combined offense level after all subsequent adjustments have been made.

Historic Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 348).

UNITED STATES SENTENCING GUIDELINES

§3D1.2 Groups of Closely-Related Counts

All counts involving substantiallay the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

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